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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

STEVE MICHAEL COX,

Plaintiff,

v.

JAMES BENEDETTI, *et al.*,

Defendants.

3:08-cv-00502-LRH-VPC

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

August 2, 2011

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. There are several related motions before the court.¹ Defendants filed a motion for summary judgment (#58),² plaintiff opposed (#95), and defendants replied (#103). Plaintiff filed a "motion to 'strike!' defendant's [sic] use of plaintiff's (11-4-2010's) oral deposition without 'corrections'" (#93), defendants opposed (#98), and plaintiff did not reply. Plaintiff also filed a "motion for Rule 11's [sic] sanction - penalties - for 'obstruction of justice/contempt of court's orders (#87)' by ESP/Atty. Gen. Office officials, et al." (#97). Defendants opposed (#101) and plaintiff did not reply. The following Report and Recommendation is based upon the court's thorough review of the motions and record.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Steve Michael Cox ("plaintiff"), a *pro se* inmate, is currently incarcerated at Ely State Prison ("ESP") in the custody of the Nevada Department of Corrections ("NDOC") (#95). Plaintiff brings his first amended complaint pursuant to 42 U.S.C. § 1983, alleging that prison officials deprived him of access to his legal property and failed to provide him with legal envelopes, violating his First and Fourteenth Amendment rights (#11). Plaintiff further claims that defendants

¹ The court addresses plaintiff's motion for copies (#94) in a separate minute order (#104).

² Refers to the court's docket numbers.

1 were deliberately indifferent to his medical needs in violation of the Eighth Amendment. *Id.*
2 Plaintiff names as defendants J. Benedetti, T. Corda, J. Peery, J. Brackbill, Dr. Bannister, G. Cox,
3 SC/O Vest, SC/O Brown, SC/O Carroll, D. Helling, and L. Bagwell. *Id.* The court screened
4 plaintiff's complaint pursuant to 28 U.S.C. § 1915A and allowed plaintiff's First Amendment access
5 to the courts, Fourteenth Amendment property rights, and Eighth Amendment deliberate indifference
6 claims to proceed (#10).

7 In count I of his complaint, plaintiff explains that on August 2, 2009, NDOC moved him
8 from ESP to Nevada State Prison ("NSP") to facilitate his participation in proceedings for case 3:03-
9 cv-00651-PMP-VPC (#11, p. 4). While he was housed at NSP awaiting the date of his settlement
10 conference, defendants in that matter served him with their motion to dismiss count five of his
11 complaint for failure to exhaust his administrative remedies on August 17, 2007. *Id.* at 6. Plaintiff
12 requested additional time to oppose the motion and the court granted him until September 18, 2007.
13 *Id.* Plaintiff claims that on August 28, 2007, "four (NSP) officials and 1-one medical staffer" raided
14 his cell and removed some of his legal items. *Id.* Plaintiff further alleges that these officials
15 assaulted him during the raid. *Id.* Plaintiff does not identify any named defendants who allegedly
16 participated in the removal of his property or the assault. *Id.* Plaintiff claims that the removal of his
17 legal property, "severely degraded/denied plaintiff's access to court and proper/vigorous prosecution
18 of count V." *Id.* at 7.

19 On August 30, 2007, NSP officials moved plaintiff to Northern Nevada Correctional Center's
20 ("NNCC") Mental Health Unit ("MHU") for evaluation. *Id.* at 8. Plaintiff believes NDOC ordered
21 the transfer because he lost over twenty pounds, which he states was caused by "an anemic
22 mental/physical health degrading condition." *Id.* During the time that NDOC housed plaintiff in
23 NNCC's MHU and the closed custody medical unit, plaintiff did not have access to his legal files.
24 *Id.* at 8-11. Plaintiff filed several grievances about his property, until he received his legal materials
25 on September 8, 2007. *Id.* at 9-11. Plaintiff states that he filed a grievance on September 4, 2007,
26 claiming that defendant Vest "refused to give plaintiff his legal property" because he was a mental
27 health patient. *Id.* at 10. Plaintiff claims that defendant Vest told him that defendants Benedetti and
28 Corda gave him the order to deny plaintiff access to his property. *Id.* Plaintiff also accuses

1 defendant Vest of lying on the grievance response by stating that he told defendant Corda that he
2 gave plaintiff an opportunity to review his legal property, which plaintiff disputes. *Id.* Plaintiff
3 accuses defendant Helling of signing off on this grievance denial. *Id.* Plaintiff further alleges that
4 defendant Corda denied an emergency grievance; defendants Brown and Carroll refused to provide
5 him with his property; and defendants Corda, Benedetti, and Bagwell all signed off on defendants
6 Brown and Carroll's denial of his property. *Id.* at 11.

7 Once plaintiff received his property, he claims it took him two to three days "to organize -
8 chronologically! his 200 to 300 (plus) pounds of: disarrayed, lost/damaged, destroyed, etc. legal
9 materials." *Id.* at 12. Plaintiff believes that he "had no time to properly research/study critical law
10 issues/cases to stop dismissal of case no. 03-0651, count V," due to not having his legal materials.
11 *Id.* Plaintiff also claims that defendants violated Administrative Regulation ("AR") 711's mandate
12 that inmates' property be returned within twenty-four or seventy-two hours. *Id.* at 9-10, 12.

13 In count two of plaintiff's complaint, he states that he sent a kite to defendant Corda
14 requesting legal supplies. *Id.* at 13. Plaintiff explains that defendant Corda directed him to send
15 such requests to the law library supervisor. *Id.* at 14. Plaintiff says that his request was not
16 adequately addressed by the law library supervisor, but notes that at the time he received a one-
17 month supply of legal materials, which he subsequently used. *Id.* Plaintiff later moved this court
18 to obtain adequate legal supplies, which the court granted. *Id.* at 15. However, plaintiff still required
19 envelopes, which he claims were not addressed in court's order granting him supplies. *Id.* Plaintiff
20 complains that he filed a separate motion for envelopes, which the court did not address, nor did
21 prison officials provide him with envelopes. *Id.* Plaintiff states that he filed motions in several other
22 pending actions requesting adequate legal supplies, but asserts that all of the motions were denied
23 or ignored and that this "correspondences [sic] used-up all of plaintiff's legal (NSF) supplies." *Id.*
24 Plaintiff filed a grievance, which he states defendants Benedetti, Corda, and Cox denied. *Id.*
25 Plaintiff explains that he resorted to using nonlegal envelopes to mail his legal documents and that,
26 as a result, defendants Benedetti, Corda, and Peery ordered his mail be returned to him. *Id.* at 16.
27 Plaintiff filed another grievance, which defendants Benedetti, Corda, and Peery again denied. *Id.*
28 Plaintiff also complains that defendants Benedetti and Cox denied other emergency and informal

1 grievances related to the issue. *Id.* Plaintiff believes these acts denied his right to access to the court.
2 *Id.* at 15-16.

3 In count three, plaintiff alleges that defendants refused to respond to his requests for medical
4 treatment of the injuries he sustained during the cell raid on August 28, 2007. *Id.* at 18. Specifically,
5 plaintiff complains that defendants Peery and Benedetti did not approve his requests for medical
6 examination and medication. *Id.* at 18. Further defendants "Peery, Brackbill, Bannister, et al."
7 denied plaintiff's grievances requesting medical treatment. *Id.* at 19. Plaintiff states that after these
8 denials of his grievances and kites, he learned of the severity of his injuries in a medical exam
9 conducted in November or December of 2007. *Id.* at 19. At this exam plaintiff claims that Dr.
10 Carter, a physician at ESP, informed him that he has permanent muscle and nerve damage from an
11 assault that occurred at ESP on October 4, 2007,³ and related to the raid on his cell at NSP. *Id.* at
12 19.

13 Defendants filed the instant motion seeking summary judgment on plaintiff's claims (#58).
14 Defendants first argue that plaintiff was not denied access to the court because an inmate must prove
15 that he suffered an "actual injury," such as the inability to file a claim or meet a deadline. *Id.* at 10
16 (citing *Lewis v. Casey*, 518 U.S. 348 (1996)). "The right to access the courts is only a right to bring
17 complaints to the federal court and not a right to discover such claims or to litigate them effectively
18 once filed with a court." *Id.* (citing *Lewis*, 518 U.S. at 354-55). Defendants explain that plaintiff
19 did not suffer an actual injury related to his opposition filing in case 3:03-cv-00651-PMP-VPC
20 because the case resulted in a grant of summary judgment, which plaintiff appealed to the Ninth
21 Circuit, that was reversed and remanded. *Id.* at 11. Ultimately, the case concluded with a jury
22 verdict for defendants. *Id.* Defendants also note that plaintiff does not allege that he was denied
23 access to the courts by the lack of access to his legal materials or to appropriate envelopes, rather he
24 claims that he was not as effective or vigorous in his litigation as he could have been. *Id.*

25 With respect to plaintiff's Eighth Amendment claim, defendants assert that plaintiff has
26 received extensive medical care and attach his medical records to document these claims. *Id.* at 12.

27
28 ³ This alleged assault is not the topic of any of plaintiff's claims in the present matter.

1 They state that "at best, [plaintiff] merely has a difference of opinion concerning the best course of
2 treatment." *Id.* Defendants also claim that if the court should find that there are potential violations
3 of plaintiff's First or Eighth Amendment rights, defendants are entitled to qualified immunity as they
4 acted reasonably at all times with respect to plaintiff's property and his medical needs. *Id.* at 13.

5 Plaintiff sues defendants in their official and individual capacities (#11, p. 20). Defendants
6 argue that suits against state employees in their official capacities are barred as a matter of law (#58,
7 p. 14). Defendants also explain that defendants Corda, Benedetti, Helling, Cox, Peery, Brackbill,
8 and Bannister did not personally participate in any alleged deprivations of plaintiff's constitutional
9 rights. *Id.* at 14. "At best, the foregoing Defendants only conduct was providing responses to
10 [plaintiff's] grievances." *Id.* As inmates do not have a right to a prison grievance process, there is
11 no liability for these acts. *Id.* (citing *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993)).

12 Plaintiff filed his opposition to defendants' motion on June 9, 2011, requesting that the court
13 consider the filing to be a "preliminary" opposition and asking the court to grant him additional time
14 to "file a more 'correct!' and 'proper!'" opposition (#95, pp. 1-2). Plaintiff states that he needs such
15 accommodation because he does not have access to adequate legal supplies. *Id.* In addition to the
16 request plaintiff made in his opposition, he filed several motions for an extension of time to oppose
17 defendants' summary judgment motion (#'s 62, 79, 89, 92). On May 23, 2011, the court granted
18 plaintiff's second motion for an extension of time and granted in part his motion for adequate legal
19 supplies (#87). The court ordered defendants to direct ESP officials to provide plaintiff with legal
20 supplies; however, after plaintiff filed his third request for an extension, which the court denied,
21 defendants notified the court that they failed to timely comply with the court's order resulting in an
22 eight-day delay in plaintiff receiving legal supplies (#91). Therefore, the court granted plaintiff's
23 fourth request for additional time (#92) and the request he made in his "preliminary" opposition
24 (#95), allowing plaintiff to file a concise supplement to his opposition by June 30, 2011. (#96).
25 Plaintiff chose not to file a supplement.

26 Plaintiff's opposition largely restates his complaint (#95). Plaintiff argues that the court
27 should apply the legal standard for a motion to dismiss for failure to state a claim, although he does
28 not explain why he believes this standard should be applied. *Id.* at 5-7. Plaintiff also believes that

1 he suffered an actual injury with respect to defendants' alleged denial of his legal papers and supplies
 2 because he spent time working on the appeal for 3:03-cv-00651-PMP-VPC. *Id.* at 15. Plaintiff
 3 believes he "mostly likely could have won/settle[d] the case" had he been provided his legal papers.
 4 *Id.* To support his opposition, plaintiff attaches his complaint for this matter; his deposition
 5 testimony with corrections; defendants' opposition to plaintiff's second motion to compel discovery
 6 and exhibits; three affidavits, which restate portions of plaintiff's complaint and opposition; Deputy
 7 Director James Cox's job duties and oath of office; several single pages of ARs and Institutional
 8 Procedures; and copies of grievance and inmate request forms (#'s 95, 95-1, 95-2).

9 Defendants note in their reply that plaintiff "disingenuously attempts to characterize
 10 Defendants' Motion for Summary Judgement as a motion to dismiss for failure to state a claim," a
 11 tactic plaintiff used in previous litigation (#103, p. 2). Defendants further argue that plaintiff failed
 12 to introduce evidence to support his claims, nor has he demonstrated that there are outstanding issues
 13 of material fact. *Id.* at 3. Finally, defendants comment on the large number of exhibits plaintiff
 14 submitted with his opposition and argue that "some . . . do not appear to have any relation to his
 15 claims and/or do not stand for the proposition(s) that he believes they do, and/or [the] exhibits
 16 actually support Defendants' arguments." *Id.* at 4.

17 The court notes that the plaintiff is proceeding *pro se*. "In civil rights cases where the
 18 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the
 19 benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir.
 20 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

21 II. DISCUSSION & ANALYSIS

22 A. Discussion

23 1. Summary Judgment Standard

24 Summary judgment allows courts to avoid unnecessary trials where no material factual
 25 disputes exist. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).
 26 The court grants summary judgment if no genuine issues of material fact remain in dispute and the
 27 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The court must view
 28 all evidence and any inferences arising from the evidence in the light most favorable to the

1 nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). However, the Supreme
 2 Court has noted:

3 [W]e must distinguish between evidence of disputed facts and disputed matters of
 4 professional judgment. In respect to the latter, our inferences must accord deference
 5 to the views of prison authorities. Unless a prisoner can point to sufficient evidence
 regarding such issues of judgment to allow him to prevail on the merits, he cannot
 prevail at the summary judgment stage.

6 *Beard v. Banks*, 548 U.S. 521, 530 (2006). Where reasonable minds could differ on the material
 7 facts at issue, however, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*,
 8 477 U.S. 242, 251 (1986).

9 The moving party bears the burden of presenting authenticated evidence to demonstrate the
 10 absence of any genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
 11 (1986); see *Orr v. Bank of America*, 285 F.3d 764, 773-74 (9th Cir. 2002) (articulating the standard
 12 for authentication of evidence on a motion for summary judgment). Once the moving party has met
 13 its burden, the party opposing the motion may not rest upon mere allegations or denials in the
 14 pleadings, but must set forth specific facts showing that there exists a genuine issue for trial.
 15 *Anderson*, 477 U.S. at 248. Rule 56(c) mandates the entry of summary judgment, after adequate time
 16 for discovery, against a party who fails to make a showing sufficient to establish the existence of an
 17 element essential to that party's case, and on which that party will bear the burden of proof at trial.
 18 *Celotex*, 477 U.S. at 322-23.

19 On summary judgment the court is not to weigh the evidence or determine the truth of the
 20 matters asserted but must only determine whether there is a genuine issue of material fact that must
 21 be resolved by trial. See *Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).
 22 Nonetheless, in order for any factual dispute to be genuine, there must be enough doubt for a
 23 reasonable trier of fact to find for the plaintiff in order to defeat a defendant's summary judgment
 24 motion. See *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

25 **B. Analysis**

26 As an initial matter, plaintiff requests that "this motion be based on Fed. R. Civ. P. 12(c)"
 27 and presents the legal standard for motions to dismiss for failure to state a claim (#95, p. 2).
 28 Plaintiff does not explain why he believes the court should construe defendants' summary judgment

1 motion as a motion to dismiss. *Id.* Defendants' summary judgment motion is appropriate at this
 2 point in the litigation, *see* Fed. R. Civ. P. 56(a)-(b), and plaintiff presents no argument to the contrary;
 3 therefore, the court declines to apply the motion to dismiss standard requested by plaintiff.

4 **1. Defendants**

5 "Liability under [§] 1983 arises only upon a showing of personal participation by the
 6 defendant. A supervisor is only liable for the constitutional violations of . . . subordinates if the
 7 supervisor participated in or directed the violations, or knew of the violations and failed to act to
 8 prevent them. There is no respondeat superior liability under [§] 1983." *Taylor v. List*, 880 F.2d
 9 1040, 1045 (9th Cir. 1989) (citations omitted); *see also Hydrick v. Hunter*, 500 F.3d 978, 988 (9th
 10 Cir. 2007); *Ortez v. Washington Cnty., State of Or.*, 88 F.3d 804, 809 (9th Cir. 1996) (concluding
 11 it is proper to dismiss where there are no allegations of knowledge of or participation in an alleged
 12 violation). Additionally, inmates are not entitled to a specific grievance procedure. *Ramirez v.*
 13 *Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (citing *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.
 14 1988)), *cert. denied* 541 U.S. 1063 (2004); *see also Lomolt v. Holder*, 287 F.3d 683, 684 (8th Cir.
 15 2002); *Shehee v. Lutrell*, 199 F.3d 295, 300 (6th Cir. 1999) (holding that prison official's denial of
 16 a grievance cannot be grounds for liability under section 1983).

17 Plaintiff sues defendants J. Benedetti, T. Corda, J. Peery, J. Brackbill, Dr. Bannister, G. Cox,
 18 SC/O Vest, SC/O Brown, SC/O Carroll, D. Helling, and L. Bagwell (#11). Plaintiff alleges that
 19 defendants Helling, Corda, Benedetti, and Bagwell all denied grievances in connection with the
 20 deprivation of plaintiff's legal property while he was housed in NNCC's MHU. *Id.* at 10-11.
 21 Likewise, plaintiff alleges that defendants Benedetti, Corda, Peery, and Cox denied grievances in
 22 connection with the provision of legal supplies. *Id.* at 15-16. Finally, plaintiff makes similar claims
 23 for alleged Eighth Amendment violations, wherein he claims that defendants Peery, Brackbill, and
 24 Bannister denied his grievances and requests for medical services. *Id.* at 18-19.

25 Other than copies of grievance forms, which confirm that plaintiff's grievances were denied,
 26 plaintiff does not offer any evidence to suggest that defendants Benedetti, Corda, Peery, Breackbill,
 27 Bannister, Cox, Helling, or Bagwell engaged in any specific acts that violated plaintiff's
 28 constitutional rights or failed to investigate any of their employees' acts that may have violated

1 plaintiff's constitutional rights. Rather, plaintiff's claims stem from his belief that these defendants
 2 erroneously denied his grievances. However, because a prison official's review and denial of
 3 grievances cannot serve as the sole basis for liability under Section 1983 and there is no supervisory
 4 liability under Section 1983, plaintiff's claims fail as a matter of law.

5 Therefore, the court recommends that summary judgment be granted in favor of defendants
 6 Benedetti, Corda, Peery, Breackbill, Bannister, Cox, Helling, and Bagwell due to their lack of
 7 personal participation in plaintiff's alleged constitutional violations.

8 **2. Claims**

9 **a. First Amendment Access to Courts**

10 Prisoners have a constitutional right of access to the courts. *See Lewis v. Casey*, 518 U.S.
 11 343, 346 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 (1977), *limited in part on other grounds by*
 12 *Lewis*, 518 U.S. at 354; *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990). However, the right of
 13 access to the courts is only a right to bring direct criminal appeals, a *habeas corpus* petition, or civil
 14 rights complaint. *See Lewis*, 518 U.S. at 354-55; *Cornett v. Donovan*, 51 F.3d 894, 898 (9th Cir.
 15 1995). "[T]he [U.S.] Supreme Court has clearly stated that the constitutional right of access requires
 16 a state to provide a law library or legal assistance only during the pleading stage of a *habeas* or civil
 17 rights action." *Cornett*, 51 F.3d at 898-99 (discussing at length the U.S. Supreme Court's decisions
 18 in *Bounds* and *Wolff v. McDonnell*, 418 U.S. 539 (1974), in concluding that the right of access
 19 requires that the state provide assistance through the pleading stage only).

20 To establish a violation of the right to access the courts, a prisoner must establish that he or
 21 she suffered an actual injury, a jurisdictional requirement that flows from the standing doctrine and
 22 may not be waived. *See Lewis*, 518 U.S. at 348 (citation omitted); *see also Alvarez v. Hill*, 518 F.3d
 23 1152, 1155 n.1 (9th Cir. 2008) (explaining that "[f]ailure to show that a non-frivolous legal claim
 24 ha[s] been frustrated is fatal" to a claim for denial of access to courts) (citing *Lewis*, 518 U.S. at 353
 25 n.4)). Actual injury is defined as actual prejudice with respect to contemplated or existing litigation,
 26 such as inability to meet a filing deadline or present a claim. *Id.* at 348 (citation and internal
 27 quotations omitted).

28 Here, plaintiff claims that defendants violated his right to access the courts by denying him

1 timely access to his legal materials so that he could prepare and file an opposition to a motion to
 2 dismiss. Plaintiff also believes defendants denied his right to access the court by failing to provide
 3 him with legal mail envelopes. However, as defendants note, plaintiff was not prevented from filing
 4 his opposition to the motion to dismiss, nor does he claim that his alleged lack of appropriate legal
 5 envelopes prevented him from filing claims or meeting deadlines. Rather, plaintiff states in his
 6 deposition testimony that defendants' acts did not prevent him from accessing the courts, but instead
 7 "degraded [his] ability to file the best-possible motions [he] can . . . [and to] effectively advocate
 8 [his] position" (Ex. D, #58-2, p. 36). With respect to plaintiff's access to legal envelopes, he states
 9 in his deposition:

10 I can't say that any particular damages occurred so far as a case being denied or a
 11 case being dismissed because of what happened. But what I'm saying now, is,
 12 because the mail wasn't sent out, it further backed up all the other cases and it just
 made it that much more difficult for me to research each case that I needed to
 research and give it my attention in order to vigorously prosecute my claim.

13 *Id.* at 37.

14 Plaintiff's perceived inability to vigorously prosecute his claims does not rise to the level of
 15 an "actual injury," which is required to state a claim for violation of his right to access the court. In
 16 fact, as defendants point out and the court knows from experience, plaintiff has successfully filed
 17 numerous, lengthy pleadings and motions in this case and many others, belying his claims that prison
 18 officials interfered with his efforts to bring alleged constitutional violations to the attention of the
 19 court. As plaintiff fails to allege facts to demonstrate that he suffered an actual injury, such as the
 20 inability to file a claim or to meet a court deadline, the court recommends that defendants' motion
 21 for summary judgment on plaintiff's First Amendment access to courts claims be granted.

22 **b. Fourteenth Amendment - Right to Property**

23 The Due Process Clause of the Fourteenth Amendment protects individuals from arbitrary
 24 government action by prohibiting states from depriving people of "life, liberty, or property without
 25 due process of law." U.S. Const. amend. XIV. Often due process claims for deprivation of property
 26 arise from the allegation that a prison official engaged in an unauthorized or random act of
 27 destruction or deprivation of an inmate's property. *Parratt v. Taylor*, 451 U.S. 527, 537 (1981);
 28 *Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984). However, the claim may instead relate to the

1 assertion that prison officials deprived an inmate of his property pursuant to a regulation that does
2 not serve a legitimate penological interest. *Hudson*, 468 U.S. at 532 n.13; *Quick v. Jones*, 754 F.2d
3 1521, 1523-24 (9th Cir. 1985).

4 Under Supreme Court rulings in *Parratt* and *Hudson*, negligent or unauthorized, intentional
5 deprivations of property do not give rise to a due process claim so long as the state provides an
6 adequate post-deprivation remedy, such as the availability of a common-law state tort action against
7 a private prison employee. *Parratt*, 451 U.S. at 537-38; *Hudson*, 468 U.S. at 533. On the other
8 hand, if the deprivation of property is carried out pursuant to an established state procedure or
9 regulation, then the plaintiff can state a claim under the Due Process Clause. *Hudson*, 468 U.S. at
10 532 n.13; *Quick*, 754 F.2d at 1523-24. Authorized property deprivations are permissible if
11 conducted pursuant to a regulation that is reasonably related to a legitimate penological interest.
12 *Turner v. Safley*, 482 U.S. 78, 89 (1987).

13 The court notes that defendants did not directly address plaintiff's Fourteenth Amendment
14 claim for deprivation of his property in their summary judgment briefing. However, based upon the
15 facts before the court, it recommends that plaintiff's due process claims be dismissed pursuant to 28
16 U.S.C. § 1915(e)(2)(B)(ii), which allows the court to dismiss claims "at any time" if it determines
17 that the cause of action filed by the inmate fails to state a claim on which relief may be granted.

18 Plaintiff argues that prison officials raided his cell and removed some of his legal property
19 (#11, p. 6). Plaintiff further asserts that defendants Vest, Brown, and Carroll denied plaintiff access
20 to his property, claiming that these acts violated time frames outlined in AR 711 and ESP IP 7.10.
21 *Id.* at 9-12; Plaintiff's Opposition to Defendants' Motion for Summary Judgment, #95, p. 9. Based
22 on these facts, the court finds that plaintiff alleges that defendants engaged in unauthorized
23 deprivation of his property in violation of established prison regulations and procedures. Such
24 deprivations do not give rise to liability under the Due Process Clause when there is an available
25 state common-law tort remedy. Plaintiff has such a remedy under Nevada Revised Statute 209.243;
26 therefore, he may not sue under Section 1983 for violation of his due process rights for the loss of
27 property.

28 The court also notes that plaintiff misunderstands the provisions of AR 711. Under the

1 regulation, an inmate transferring to another facility for court or medical reasons is entitled to bring
 2 legal work with him (Ex. A, Attch. 6, #58-1, p. 35). The only exception to this rule is for inmates
 3 who are transferred for less than a seventy-two hour period. *Id.* Plaintiff mistakenly reads this
 4 provision to state that he should have received his legal property within seventy-two hours of
 5 transfer. That is plainly not the meaning of the regulation. Similarly, plaintiff asserts that defendants
 6 conduct violates ESP IP 7.10, but ESP's institutional procedures do not apply to other institutions
 7 such as NSP and NNCC where the acts giving rise to plaintiff's complaint occurred.

8 Therefore, the court recommends that plaintiff's Fourteenth Amendment claims for
 9 deprivation of his legal property be dismissed with prejudice pursuant to 28 U.S.C. §
 10 1915(e)(2)(B)(ii), as plaintiff can allege no set of facts under which the purported unauthorized
 11 deprivation of his property states a due process claim. The court cautions defendants to address all
 12 claims, which are permitted to proceed in the screening order, in their motions for summary
 13 judgment.

14 c. Deliberate Indifference to Serious Medical Needs

15 A prisoner's claim of inadequate medical care arises under the Eighth Amendment. The
 16 unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by
 17 the Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). To prevail on an action
 18 alleging cruel and unusual punishment, a plaintiff's case must satisfy an objective standard – that
 19 the deprivation was serious enough to amount to cruel and unusual punishment, and a subjective
 20 standard – deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *see also Wilson*
 21 *v. Seiter*, 501 U.S. 294, 297-304 (1991). A prison official violates the Eighth Amendment when he
 22 responds with deliberate indifference to an inmate's serious medical need. *Farmer*, 511 U.S. at 834.

23 The objective requirement of a "serious medical need" is met if the failure to treat a
 24 prisoner's condition could result in further significant injury or the "unnecessary and wanton
 25 infliction of pain." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*,
 26 429 U.S. 97, 104 (1976)). In this circuit, examples of serious medical needs include "the existence
 27 of an injury that a reasonable doctor or patient would find important and worthy of comment or
 28 treatment; the presence of a medical condition that significantly affects an individual's daily

activities; or the existence of chronic and substantial pain.” *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (citations omitted).

The subjective standard of deliberate indifference requires “more than ordinary lack of due care for the prisoner’s interests or safety.” *Farmer*, 511 U.S. at 835, (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). The requisite state of mind lies “somewhere between the poles of negligence at one end and purpose or knowledge at the other.” *Id.* at 836. To prove deliberate indifference, plaintiff must demonstrate that prison staff denied, delayed, or intentionally interfered with medical treatment or that the way prison staff provided medical care indicates deliberate indifference, and that plaintiff sustained damages as a result of such conduct. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988). Prison medical staff do not violate the Eighth Amendment simply because their opinion concerning medical treatment conflicts with the opinion of the inmate-patient. *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). Moreover, “mere delay of surgery, without more, is insufficient to state a claim of deliberate medical indifference.” *Shapley v. Nev. Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam); accord *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992).

Further, a difference of opinion between medical professionals concerning the appropriate course of treatment generally does not amount to deliberate indifference to serious medical needs. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). However, a prisoner can establish that such a difference of opinion amounted to deliberate indifference where “the course of treatment the doctors chose was medically unacceptable under the circumstances,” and such a course of treatment was chosen “in conscious disregard of an excessive risk to the prisoner’s health.” *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (citing *Williams v. Vincent*, 508 F.2d 541, 543-44 (2d Cir. 1974) (holding that inmate stated a claim for deliberate indifference where prison medical staff threw away the inmate’s severed ear, told the inmate that “he did not need [it],” and made no effort to reattach it)).

Plaintiff’s Eighth Amendment claims arise from his allegation that defendants failed to provide him with adequate medical treatment following a raid on his cell, during which plaintiff claims unnamed prison officials and a medical staff person beat him. First, the court has already

1 recommended summary judgment in favor of plaintiff's claims that defendants Peery, Benedetti,
2 Brackbill, and Bannister denied his grievances. Plaintiff does not name any other defendants in
3 connection with his Eighth Amendment claims so summary judgment in favor of these defendants
4 effectively results in summary judgment on plaintiff's deliberate indifference claims. However, even
5 if plaintiff did name other defendants in connection with the alleged failure to treat his injuries in
6 connection with the raid on his cell, the court would still recommend summary judgment in favor
7 of defendants.

8 Plaintiff claims a cell raid and assault took place on August 28, 2007 and that he did not
9 receive treatment for injuries sustained during this event. Defendants submit plaintiff's medical
10 records for the period from August 9, 2007, through September 24, 2008 (Ex. B, Attch. 1, #64-1
11 (*sealed*)). The medical records reveal that prior to the "raid," plaintiff told medical staff he could
12 not eat because he was anemic, which was caused by a mental disorder. *Id.* at 5. He also refused
13 showers stating that he feared he would slip and fall in the shower. *Id.* The medical record for
14 August 28, 2007, states that plaintiff refused to comply with the nurse's effort to weigh him. *Id.* at
15 6. Officials searched plaintiff's cell while he was seated in the hallway. *Id.* After the search, NDOC
16 officials returned plaintiff to his cell and ordered him to weigh himself. *Id.* Plaintiff did not eat in
17 the days following this encounter, and on August 30, 2007, medical staff transferred him to the MHU
18 at NNCC. *Id.* After the alleged assault on August 28, 2007, there are approximately thirty-five
19 entries in plaintiff's medical record for the remainder of 2007. *Id.* at 6-12. These entries describe
20 in detail the medical care plaintiff received including numerous assessments, medication, a walker,
21 and appointments with a neurologist. *Id.*

22 The court finds that plaintiff received adequate medical care during the time about which he
23 complains, as evidenced by the ongoing, regular attention he received from medical staff. Plaintiff's
24 allegations that they refused to provide him with care for his alleged injuries or related medical
25 condition is not supported by evidence and, in fact, is directly contradicted by plaintiff's detailed
26 medical records. At most, plaintiff's allegations reflect his difference of opinion about the medical
27 care he received, which is not sufficient to state an Eighth Amendment claim.

28 For the reasons articulated above, the court recommends that summary judgment be granted

1 in favor of defendants for plaintiff's Eighth Amendment deliberate indifference claims.

2 3. Plaintiff's Nondispositive Motions

3 a. Motion to Strike

4 Plaintiff filed a motion to strike defendants' use of his deposition testimony in their motion
5 for summary judgment without attaching his written corrections (#93). Defendants opposed the
6 motion, noting that they relied on testimony in their summary judgment motion that is unchanged
7 by plaintiff's corrections and also commenting that plaintiff submitted a copy of his corrections with
8 his opposition to defendants' motion for summary judgment, "rendering any deficiency (if any there
9 was), moot" (#98, p. 3).

10 The court recommends that plaintiff's motion to strike (#93) be denied as moot in light of
11 the court's recommendation that all claims in the case be decided on summary judgment or
12 dismissed pursuant to 28 U.S.C. § 1915(e).

13 b. Motion for Rule 11 Sanctions

14 Plaintiff filed a motion for Rule 11 sanctions in connection with defendants' eight-day delay
15 in directing ESP to comply with the court's May 23, 2011 order to provide plaintiff with legal
16 supplies (#97). Defendants opposed the motion, stating the Rule 11 sanctions are inapplicable, that
17 they acted with candor when they notified the court of the delay, and that the court granted plaintiff
18 additional time to file a supplementary brief thereby alleviating any possible harm caused to plaintiff
19 (#101, p. 3-4).

20 The court recommends that plaintiff's motion for sanctions (#97) be denied, as plaintiff was
21 not harmed by the eight-day delay. In fact, the court granted plaintiff additional time to file a
22 supplement to his opposition, which he declined to do.

23 III. CONCLUSION

24 Based on the foregoing and for good cause appearing, the court concludes that defendants
25 met their burden of proving that there are no genuine issues of material fact for trial. Therefore, the
26 court recommends that defendants' motion for summary judgment (#58) be **GRANTED** in part for
27 plaintiff's claims against defendants Benedetti, Corda, Peery, Breackbill, Bannister, Cox, Helling,
28 and Bagwell; plaintiff's First Amendment access to the court claims; and plaintiff's Eighth

1 Amendment deliberate indifference claims. The court further recommends that plaintiff's Fourteenth
2 Amendment claim for deprivation of property be **DISMISSED WITH PREJUDICE** pursuant to
3 28 U.S.C. § 1915(e), for failure to state a claim upon which relief may be granted. Finally, the court
4 recommends that plaintiff's motions to strike (#93) and for sanctions (#97) be **DENIED**. The parties
5 are advised:

6 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB-3-2 of the Local Rules of Practice,
7 the parties may file specific written objections to this Report and Recommendation within fourteen
8 days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
9 Recommendation" and should be accompanied by points and authorities for consideration by the
10 District Court.

11 2. This Report and Recommendation is not an appealable order and any notice of appeal
12 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

13 **IV. RECOMMENDATION**

14 **IT IS THEREFORE RECOMMENDED** that defendants' summary judgment motion (#58)
15 be **GRANTED** in part for plaintiff's claims against defendants Benedetti, Corda, Peery, Breackbill,
16 Bannister, Cox, Helling, and Bagwell; plaintiff's First Amendment access to the court claims; and
17 plaintiff's Eighth Amendment deliberate indifference claims.

18 **IT IS FURTHER RECOMMENDED** that plaintiff's Fourteenth Amendment claim for
19 deprivation of property be **DISMISSED WITH PREJUDICE** pursuant to 28 U.S.C. § 1915(e), for
20 failure to state a claim upon which relief may be granted.

21 **IT IS FURTHER RECOMMENDED** that plaintiff's motions to strike (#93) and for
22 sanctions (#97) be **DENIED**.

23 **DATED:** August 2, 2011

24
25 
26 **UNITED STATES MAGISTRATE JUDGE**
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